FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-105

CURTISS-WRIGHT CORPORATION,
Petitioner,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

ISAAC N. GRONER
WALTER H. FLEISCHER
ALFRED F. BELCUORE

COLE AND GRONER, P.C.
1730 K Street, N.W.
Washington, D.C. 20006

ALBERT G. BESSER

HANNOCH, WEISMAN, STERN & BESSER, P.A.
744 Broad Street
Newark, New Jersey 07102

Of Counsel:

JAMIE H. GEARON
General Electric Company
One River Road
Schenectady, New York 12345

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BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does Rule 54(b), Federal Rules of Civil Procedure, which permits more than one appeal in a case only in the "infrequent harsh case," sanction a District Court's attempting to make final an Order adjudicating fewer than all of the claims between the parties for reasons which would apply to most cases involving a money judgment?

2. Did the Court of Appeals correctly hold that under Rule 54(b), an adjudication of only one of the many claims between the parties was not properly entered as a "final judgment" when the party in whose favor it ran (i) showed no specific hardship it would

suffer if entry of final judgment awaited the end of litigation, (ii) faced substantial counterclaims, and (iii) itself was primarily responsible for the consequence of which it complains because of its long delay in asserting claims?

3. Does a case become an "infrequent harsh case" merely because it involves a large sum of money, and statutory interest rates are below current market rates?

COUNTERSTATEMENT OF THE CASE

Respondent General Electric Company ("General Electric") serves as a prime contractor of the United States Navy ("Navy") with responsibility for the procurement and administration of supply and service contracts for the Naval Nuclear Program. Starting in 1968, General Electric entered into a series of subcontracts with Petitioner Curtiss-Wright Corporation ("Curtiss-Wright") for the manufacture of large nuclear components used in the propulsion system of Naval Nuclear vessels, for a fixed price. The first 21 of these contracts, having a value of almost $215,000,000, are involved in this action (Appendix ("A.") 8-9).

In the performance of these contracts, Curtiss-Wright incurred substantial cost overruns, which became known to Curtiss-Wright at least by 1971 (Transcript of the Deposition of T. Roland Berner, Chairman of the Board and President of Curtiss-Wright, at 257, in the District Court Record on file with the Clerk of this Court). In 1975, Curtiss-Wright filed a Request for Extraordinary Contractual Relief with the Navy, pursuant to Public Law 85-804, 50 U.S.C. § 1431, covering the 21 contracts involved in this action, asking the Government, in its discretion, in the interests of

national defense, to grant it additional monies for performing its contracts. In the course of its dealing with the Request, the Navy indicated that it would not entertain the Request unless Curtiss-Wright certified that it had no contractual remedy against General Electric (*see, e.g.*, Court of Appeals Appendix 174, on file with the Clerk of this Court). Only then—more than six years after the principal events allegedly supporting its claims occurred—did Curtiss-Wright, on April 30, 1976, file its Complaint in this action (A. 6-41).

The original Complaint recited 16 Counts ranging from fraud and misrepresentation and mistake to breach of contract, all in an effort to shift to General Electric the burden resulting from Curtiss-Wright's performance problems. The Complaint included allegations that General Electric had made certain oral representations, for example, that Curtiss-Wright would realize a specific profit on these fixed-price contracts which contained no provision for reimbursement of cost overruns; that General Electric had promised a certain volume of yearly business to Curtiss-Wright regardless of Curtiss-Wright's performance and competitive posture; and that General Electric had conspired with the Navy to defraud Curtiss-Wright and deprive it of further Naval Nuclear Program business (A. 9-10, 12, 21, 22). Curtiss-Wright demanded, *inter alia,* that it be awarded damages as the result of "fraud," and that its fixed-price contracts be reformed into cost-plus contracts giving it a profit.

The principal allegations of the Complaint were directed to events which occurred years before the action was commenced. The fraud in the inducement claims

were based upon representations which allegedly occurred primarily in 1968 when Curtiss-Wright entered the business of procuring large components for the Naval Nuclear Program, and prior to its 1969 agreement to expand significantly its participation in that Program (A. 9-11; *see also* Plaintiff's Response to Defendant's Interrogatories to Plaintiff, Nos. 3, 6-11, in the District Court Record). Most of the other claims were based upon allegations of "mutual mistake" or overreaching by General Electric, in this same early period, which Curtiss-Wright claimed resulted in the contracts not making "adequate provision" for the difficulty of the work (A. 25).

In response to the Complaint, General Electric not only denied the Curtiss-Wright allegations and interposed several affirmative defenses, but also filed Counterclaims seeking a recovery of some $54,000,000 (A. 42-70; Defendant's Response to Plaintiff's Second Set of Interrogatories to Defendant, *e.g.*, No. 69, in the District Court Record). The gist of General Electric's Counterclaims was that Curtiss-Wright had failed to perform these contracts competently, as it had represented that it could and would do; and that, as a consequence of Curtiss-Wright's failure to perform competently, General Electric was required to render extraordinary technical and managerial assistance to Curtiss-Wright, which enabled Curtiss-Wright eventually to manufacture and deliver the components that Curtiss-Wright was contractually obligated to deliver and to avoid even further losses and substantial termination-for-default damages (A. 63-69).

After issue had been joined on its original Complaint, Curtiss-Wright amended it to add three Counts alleging that it was entitled to final payment, aggregating approximately $19,000,000, under these contracts, de-

spite its assertion in this action of other claims arising under them (A. 78-80, 208-09). This final payment was withheld by General Electric in reliance upon a clause, appearing in each of the 21 contracts, providing that "Seller [Curtiss-Wright] . . . agree[s] as a condition precedent to final payment, that the Buyer [General Electric] and the Government . . . are released from all liabilities, obligations and claims arising under or by virtue of this order" (Terms and Conditions of Purchase, Article 5c, A. 103).[1] Curtiss-Wright offered a qualified release, purporting to reserve "only" the claims of more than $60,000,000 made in its Complaint (A. 95-96; Plaintiff's Response to Defendants' Interrogatories to Plaintiff, Nos. 63-76 in the District Court Record). After receiving the views of the Navy that the release clause should not be waived, General Electric declined to make final payment without an appropriate release.[2]

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[1] Each of the subcontracts (with one apparently inadvertent exception) also contains the following standard form invoicing instructions:

> "The final invoice(s) shall be marked 'FINAL' on the face of the invoice to signify billing is complete under this Order and that all claims on this Order against General Electric Company M.A.O. and/or the Government have been resolved." (A. 205).

The Terms and Conditions of Purchase also provide that:

> "Except as otherwise provided in this order, e.g., progress payments, no payment by Buyer shall be due until thirty (30) days after (1) receipt of an acceptable invoice and appropriate evidence that Seller has met all the requirements of the order, or (2) receipt of the supplies at destination, whichever last occurs." (Article 5a, A. 103).

[2] The Navy stated:

> "The claims which Curtiss-Wright proposes be excepted from the claims release were filed years after the contracts were entered, and in many cases years after the occurrence of the

Upon cross-motions for partial summary judgment directed to the release issue, the District Court held that Curtiss-Wright was entitled to final payment notwithstanding the release clause (A. 172).

At the same time that Curtiss-Wright moved for partial summary judgment, it also filed a motion, based on several grounds, to dismiss General Electric's Counterclaims and to strike certain affirmative defenses including the right of set-off. That motion was denied (A. 173-74).

Curtiss-Wright then moved for a certification of the District Court's orders awarding it final payment as final judgments under Rule 54(b). The District Court recognized that "[b]oth the plaintiff and the defendant appear to be financially sound. Therefore, plaintiff's financial condition is such that it would be able to await the payment of these sums, and defendant's economic status is such that defendant will be able to satisfy the judgment whenever final judgment is entered" (A. 198). It recited that Rule 54(b) certifications "should be reserved for the infrequent harsh

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events on which the claims are based. Curtiss-Wright was or should have been fully cognizant that this late identification of claims likely would result in withholding of final payment until the claims were resolved. Based on the above, it is clear that the existence of outstanding claims at the time when final payment otherwise would be due is the result of Curtiss-Wright's own actions, the consequences of which were or should have been known to Curtiss-Wright.

"Curtiss-Wright's present pursuit of claims against [General Electric] under its subcontracts requires, by the terms and conditions of the subcontracts, a withholding of monies until such time as an unqualified claims release is effected." (A. 152-53).

Navy approval was required for the determination of final price, and thus for final payment, by the prime contracts between the Navy and General Electric and by the subcontracts between Curtiss-Wright and General Electric (A. 146).

case because of the overload which would otherwise result in the federal appellate courts" (A. 197). Nonetheless, it reasoned that this requirement was met solely because (a) a large sum was involved and (b) the statutory interest rate of six percent to which Curtiss-Wright would be entitled under applicable New York law was below present market rates (A. 198). A delay in this circumstance was characterized as a "great injustice" (A. 198). The District Court also stated that the presence of General Electric's Counterclaims was a factor weighing against certification, but was one "outweighed" by those it relied upon (A. 199).

In moving for entry of a Rule 54(b) certification, Curtiss-Wright had attempted no showing of specific adverse consequences upon itself flowing from a delay in payment, beyond the receipt of interest at the statutory rate rather than current market rates. There was no suggestion, for example, that cash flow problems or any other specific corporate problem would ensue.

On motions of General Electric, the District Court stayed the Orders granting Rule 54(b) certifications without bond, finding that "the financial position of . . . General Electric Company is sufficient to provide unquestionable security for Plaintiff. . . ." (A. 203).

On the appeal by General Electric, the United States Court of Appeals for the Third Circuit vacated the Orders granting Rule 54(b) certification, and therefore did not reach the merits of the release clause issue also raised by General Electric. *Curtiss-Wright Corp.* v. *General Electric Co.*, 597 F.2d 35 (3d Cir. 1979), A. 220. Following its earlier decision in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975), the Court held that "[i]n the absence of unusual or harsh circumstances"—such as ones "involv-

ing considerations of solvency, economic duress, etc." —and in the face of substantial counterclaims, a Rule 54(b) final judgment should not be entered. 597 F.2d at 38. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied. 599 F.2d 1259 (3d Cir. 1979).

SUMMARY OF ARGUMENT

I. The general rule in Federal appellate procedure is that there should be only one appeal in a case, after a judgment which adjudicates all the issues on the merits and leaves nothing to be done but the execution of the judgment. This Court has consistently held that this rule should be strenuously enforced because it serves the interests of justice in obtaining the fairest and most expeditious disposition of the claims of all litigants; the most recent such holding was *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463 (1978).

Rule 54(b) was intended to be a narrow exception to the general rule, an exception strictly limited to the "infrequent harsh case." This was the touchstone defined by the Advisory Committee on Rules for Civil Procedure ("Advisory Committee"), explicating the 1946 amendment permitting the entry of judgment upon fewer than all claims in a case with multiple claims. The "infrequent harsh case" test has been invariably applied by the Federal courts in passing on applications for final judgment under Rule 54(b), and it was applied by the Court of Appeals in this case.

As the Court of Appeals held, application of that test establishes that there should have been no Rule 54(b) certification of final judgment in this case. Petitioner did not make a showing, and indeed did not

genuinely attempt to make any such showing, of unique hardship or other special circumstances, that would satisfy the "infrequent harsh case" standard. Quite to the contrary, the factors proffered by Petitioner and accepted by the District Court, essentially that a significant sum of money was involved and that the market interest rates were above the statutory rate New York has provided for judgments, would be generally applicable to money judgment cases.

II. A. In the Courts below, Petitioner did not shoulder that burden that Rule 54(b) imposes upon an applicant for certification; it made no showing of special hardship or need for these funds as the Rule demands. Indeed, there was not even any attempt to show that lack of these funds would inhibit any corporate activities. Furthermore, Petitioner was not so desirous of these funds that it pressed its claims diligently and without delay. To the contrary, this case commenced in April 1976 rests primarily upon allegations as to representations made and contract negotiations completed by early 1969. Any delays in receipt of funds to which it may be entitled reflect Curtiss-Wright's own delays in raising and gaining resolution of its alleged claims.

B. The idea of equal justice under law is patently violated by establishing a dollar-amount test for certification under Rule 54(b), as Petitioner demands in its insistence that the mere presence of a large sum of money defines a hardship so severe as to require Rule 54(b) certification. Such an unseemly test would generally favor the rich over the poor. In any event, if the time when an appeal should be taken and decided is to be defined by dollar amount, that is properly for the legislature, not the judiciary, to determine. *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 472.

C. The rate of interest to be paid on judgments is likewise a matter for the legislative and not the judicial branch. It was improper for the District Court to rely on the fact that market rates of interest were greater than that provided by the undisputably applicable New York law as a factor supporting Rule 54(b) certification. A Federal District Judge in a diversity case should not substitute his own feelings as to the proper interest rate on judgment for the statutory rate prescribed by the applicable State Law.

There is no injustice even if the legislature should provide that there be no interest on judgments or that the interest rate should be relatively low. Various Congressional enactments illustrate this, for different Federal statutes bear different provisions for interest. Further illustrating that the subject is indeed one for treatment by legislation, a Bill now before the Congress, passed by the Senate, would make the applicable rate of interest on judgments in Federal Courts that provided in the Internal Revenue Code. State legislatures likewise from time to time change the rates applicable to interest on judgments. For a District Judge to modify the legislatively defined rate because he believes it inadequate in a particular case is to invade the legislative province.

In any event, disregarding the well-established finality rule would be a destructive solution to any problem involving the inadequacy of statutory interest rates. Normal, orderly judicial administration would suffer and many litigants whose turn in court was delayed would lose interest, particularly if their claims were unliquidated.

D. Rule 54(b) has been appropriately applied where there are indeed present such unique circum-

stances as to reflect the likelihood of assets being withdrawn. This Court has analogized Rule 54(b) to doctrines permitting interlocutory appeal from orders which bear "irreparable" consequences. No such circumstances or consequences are shown here as would justify certification under Rule 54(b).

III. A. Inasmuch as the Court below relied upon the existence of substantial counterclaims as only one factor, albeit a potent one, militating against the permissibility of Rule 54(b) certification, Petitioner is addressing only an imaginary issue in contending that there should be no *per se* rule precluding Rule 54(b) certifications when there are unadjudicated counterclaims. The Third Circuit's consideration of the existence of counterclaims as a strong factor is in accord with other authority and with just and effective judicial administration. It makes little practical or legal sense to order the payment over of monies which thereafter in the same litigation may well have to be returned with a larger judgment ultimately awarded the other party.

B. Petitioner goes so far as to contend that the existence of counterclaims may not even be considered in Rule 54(b) certifications. The short answer is that nothing in the Rule or in the Advisory Committee Notes suggests that the pendency of counterclaims was to be considered irrelevant in determining whether a case was an "infrequent harsh case." To the contrary, it is clear that under Rule 54(b), as amended in 1946, "it will probably be a rare case in which the Court will find it advisable to enter a final, appealable judgment

on a claim or compulsory counterclaim prior to judgment on the other side of the case. . . ." 3 *Moore's Federal Practice,* ¶ 13.17 (2d ed. 1979).

C. Further, Petitioner urges that factors such as hardship or the existence of counterclaims may not be taken into account by the District Court in considering whether to grant an application for Rule 54(b) certification, because these are factors to be considered in ruling upon an application for stay under Rule 62(h). In historical fact, however, Rule 62(h) was derived from language which appeared in Rule 54(b) until 1946; it is unreasonable to contend that those who were relying upon District Courts to adhere to the "infrequent harsh case" touchstone under Rule 54(b) were somehow precluding the selfsame District Courts from adhering to that touchstone merely because they had transferred some of the phraseology of Rule 54(b) to Rule 62(h). Rules have different functions; and nothing supports the notion that a fact pertinent to decision in the application of one Federal Rule of Civil Procedure is thereby excluded from consideration under another of the Rules. In particular, while Rule 62(h) is not concerned with the number of appeals, continuing allegiance to the "infrequent harsh case" test in passing on Rule 54(b) applications serves the fundamental policy against burdening the Courts of Appeals with piecemeal appeals.

IV. There can be no question that Courts of Appeals have the authority and the duty to review Rule 54(b) certifications for abuse of discretion. So this Court held in *Sears, Roebuck and Co.* v. *Mackey,* 351 U.S. 427,

437 (1956). Such review is essential; it is imperative, for example, to insure that District Courts not become so lax or routine in Rule 54(b) certifications that the adjudication of appeals from judgments disposing of all claims in a case are not unduly delayed or diverted. The judgment of the Court of Appeals is entitled to be affirmed unless the Court below is deemed to have misconceived its review function. *Cf. National Labor Relations Board* v. *Pittsburgh S.S. Co.,* 340 U.S. 498, 502-503 (1951). There was here no such misconception. The review function was properly and correctly performed in accordance with law. The judgment below should be affirmed.

ARGUMENT

I. RULE 54(b) PERMITS AN EXCEPTION TO THE STRONG FEDERAL POLICY AGAINST PIECEMEAL APPEALS ONLY IN THE "INFREQUENT HARSH CASE."

A. Orders Adjudicating Fewer Than All Claims May Be Certified As Final Judgments Under Rule 54(b) Only In The "Infrequent Harsh Case."

The relationship between Rule 54(b) and the strong Federal policy against piecemeal appeals is at the heart of this case. Petitioner's position, as we shall show, is nothing more or less than the contention that Rule 54(b) intends a routine if not automatic exception to that policy in cases involving multiple claims and multiple parties. The vice of this position is that it does not accord with the intention and proper purpose of Rule 54(b), which was to permit an appeal in such cases only rarely, only in the "infrequent harsh case."

The quoted words appear in the Advisory Committee Note issued in 1946 when the Rule was amended and

put in substantially its present form as to multiple claim cases:[3]

> "After extended consideration, it [the Advisory Committee] concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the *infrequent harsh case* to provide a simple, definite, workable rule." Note of Advisory Committee on Rules for Civil Procedure, 5 F.R.D. 433 at 473 (1946).[4]

The explanation of a Federal Rule provided by the Advisory Committee Note reflects the intention and history of the Rule. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 173-174, 176, 177 (1974). "The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency. But in ascertaining their meaning the construction given to them by the Committee is of weight." *Mississippi Publishing Corp.* v. *Murphree,* 326 U.S. 438, 444 (1946); *accord, Selph* v. *Council of City of Los Angeles,* 593 F.2d 881, 883, n. 1 (9th Cir. 1979); *Maryland Casualty Co.* v. *W. S. Conner,* 382 F.2d 13, 16 (10th Cir. 1967).

Accordingly, the Advisory Committee's pronouncement of the intention and scope of Rule 54(b) has been

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[3] *See* 6 *Moore's Federal Practice* ¶ 54.27 [2.-3] at 328-29 (2d ed. 1976). In 1961, the Rule was again amended to permit entry of a final judgment against one or more, but fewer than all, of the parties in a multiple party action, if the requisite certification was made. *Id.*

[4] It is clear from the text of the Advisory Committee Note that the "older federal rule" referred to was the strong rule against piecemeal appeals.

Emphasis is added and citations are omitted from quotations throughout this Brief.

recognized as fashioning the proper touchstone for judicial application of the Rule. Consistently the Courts have recognized the "infrequent harsh case" requirement. *See, e.g., Brunswick Corp.* v. *Sheridan,* 582 F.2d 175, 183 (2d Cir. 1978); *Campbell* v. *Westmoreland Farm, Inc.,* 403 F.2d 939, 942 (2d Cir. 1968); *Panichella* v. *Pennsylvania Railroad Co.,* 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied,* 361 U.S. 932 (1960); *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.,* 521 F.2d 360 (3d Cir. 1975); *Huckeby* v. *Frozen Food Express,* 555 F.2d 542, 550 (5th Cir. 1977); *U.S. General, Inc.* v. *City of Joliet,* 598 F.2d 1050, 1051 n. 1 (7th Cir. 1979); *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.,* 271 F.2d 257, 259 (7th Cir. 1959), *cert. denied,* 362 U.S. 928 (1960); *Gas-A-Car, Inc.* v. *American Petrofina, Inc.,* 484 F.2d 1102, 1105 (10th Cir. 1973); *Liquilux Gas Services of Ponce, Inc.* v. *Tropical Gas Co.,* 48 F.R.D. 330, 332 (D.P.R. 1969). In the apropos words of Judge Hastie:

> "54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel. The power which this Rule confers upon the trial judge should be used only 'in the infrequent harsh case' as an instrument for the improved administration of justice and the more satisfactory disposition of litigation in the light of the public policy indicated by statute and rule. See 6 Moore, Federal Practice, 1953, 264-65." *Panichella* v. *Pennsylvania Railroad Co.,* 252 F.2d 452, 455 (3d Cir. 1958).

"[E]ntry of final judgment under Rule 54(b) is not to be done lightly, particularly when the action remains pending as to all parties." *Brunswick Corp.* v. *Sheridan, supra,* 582 F.2d at 183 (Friendly, J.). "[T]here must be some danger of hardship or injustice through delay which would be alleviated by immediate appeal."

Western Geophysical Co. of America, Inc. v. *Bolt Associates, Inc.*, 463 F.2d 101, 103 (2d Cir.), *cert. denied*, 409 U.S. 1040 (1972). "[B]oth courts and commentators have expressed the exceptional nature of a Rule 54(b) certification." *Page* v. *Preisser*, 585 F.2d 336, 339 (8th Cir. 1978). The discretion to certify "should be exercised cautiously and infrequently." *Purdy Mobile Homes, Inc.* v. *Champion Home Builders Co.*, 71 F.R.D. 341, 342 (E.D. Wash. 1976), *aff'd*, 594 F.2d 1313 (9th Cir. 1979).

In light of the predominant principle that Rule 54(b) is an exception to the general rule that a final judgment may be entered only upon adjudication of all claims, so that there is but one appeal in the entire case, the burden is on the party seeking certification to show that there is "no just reason" for delaying entry of judgment until the end of the case, as demanded by the rule against piecemeal appeals; he cannot make this showing unless he affirmatively satisfies the "infrequent harsh case" requirement. *See Allis-Chalmers Corp.* v. *Philadelphia Electric Co., supra*, 521 F.2d at 365; 10 Wright & Miller, *Federal Practice and Procedure: Civil* § 2659 at 75-76 (1973). So far is Petitioner from recognizing this bedrock principle that acceptance of its position would generate Rule 54(b) certifications in *every* multiple claim suit, for Petitioner alleges, "[t]he injustice inherent in any delay of a party's ability to enjoy the benefits of a judgment in its favor is alone sufficient to warrant the application of Rule 54(b)" (Brief for Petitioner ("Pet. Br.") 9)). This plea for automatic certification is manifestly at the opposite end of the spectrum from the actual provisions and purposes of Rule 54(b).

B. There Is A Strong Federal Policy Against Burdening The Courts With More Than One Appeal In A Case; The General Rule Is That One Final Judgment, Disposing Of All Claims, Should Be Entered At The Conclusion Of The Entire Case.

The restriction of permissible 54(b) certification to the "infrequent harsh case" accords with the paramount Federal policy against piecemeal appeals and generally prescribing that there shall be but one appeal per case, to be taken after all claims have been completely adjudicated, so that there is a judgment which is a genuinely final judgment.

"The finality requirement in § 1291 evinces a legislative judgment that '[r]estricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.' " *Coopers & Lybrand* v. *Livesay, supra*, 437 U.S. at 469-70, quoting *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). "Federal appellate jurisdiction generally depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Coopers & Lybrand* v. *Livesay, supra*, 437 U.S. at 467, quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). "The case is not to be sent up in fragments . . . ." *Luxton* v. *North River Bridge Co.*, 147 U.S. 337, 441 (1893).

Any benefit which a particular party may derive from a piecemeal appeal "is outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice. The potential waste of judicial resources is plain . . . ."

Coopers & Lybrand v. *Livesay, supra,* 437 U.S. at 473. Manifest it is that:

> "[P]articularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Kerr* v. *United States District Court for the Northern District of California,* 426 U.S. 394, 403 (1976), quoting *Ex Parte Fahey,* 332 U.S. 258, 260 (1947).

The pervasive general policy that there should be but one appeal per case, when all claims have been disposed of finally, demands that the Rule 54(b) exception be confined to the "infrequent harsh case." That policy serving the interests of justice refutes the notion, reflected in the Brief for Petitioner, that 54(b) certifications may be provided routinely and extended on grounds applicable to entire groups of cases.

II. PETITIONER CURTISS-WRIGHT DID NOT EVEN ATTEMPT TO SHOW THAT THIS IS AN "INFREQUENT HARSH CASE." TO THE CONTRARY, THE GROUNDS IT ADVANCES FOR 54(b) CERTIFICATION, THAT A SUM CONSIDERED SUBSTANTIAL IS INVOLVED AND STATUTORILY PRESCRIBED INTEREST RATES ARE BELOW CURRENT RATES, CHARACTERIZE VIRTUALLY ALL MONEY JUDGMENT CASES, AND IN ANY EVENT, ARE INAPPROPRIATE CONSIDERATIONS FOR SUCH CERTIFICATIONS.

A. Petitioner Has Not Attempted To Shoulder Its Burden Of Proving This Is An "Infrequent Harsh Case."

To this point, we have demonstrated that the general rule in Federal appellate practice is that appeals

may lie only from judgments adjudicating all claims, and that the exception provided in Rule 54(b) is applicable only in the "infrequent harsh case." In utter disregard of this well established law, Petitioner rests on an assertion, supported by no authority, that the insistence of the Court below upon "unusual or harsh circumstances" is "unworkable" and "fails to provide the District Courts with any meaningful guidance" (Pet. Br. 28-29). The predicate of Petitioner's position is that Rule 54(b) certifications are to be afforded routinely and as an accommodation. Petitioner stands the law on its head. Petitioner assigns to the Court of Appeals and Respondent the burden of showing that factors exist which create a just reason for delay, whereas in right posture the law mandates that Petitioner has the burden of showing that it has an "infrequent harsh case"—that there is no just reasons for delay—which alone may justify certification under Rule 54(b).

In the Courts below, Curtiss-Wright did not even assay any showing that it has a pressing immediate need for the funds. Indeed, while this dispute was in the Courts below, Curtiss-Wright was so very far from financial hardship that it was able to mobilize extensive resources in a quest for control of Kennecott Copper Corporation, an even larger corporation. *See generally Kennecott Copper Corp.* v. *Curtiss-Wright Corp.*, 584 F.2d 1195, 1198 (2d Cir. 1978). Curtiss-Wright presented not an iota of evidence that the lack of the funds it seeks to recover here affected even slightly its pursuit of that major corporate effort, or of any other corporate activities. Nor has Curtiss-Wright suggested that lack of the contested funds will hinder its prosecution of this lawsuit; and even if it did, this Court has recently held that an order is and

remains unappealable even though the size of the financial burden involved may make it impossible for the plaintiff to continue with the action. *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 473. In any event, the orderly administration of justice may well require a large corporation to await the outcome of litigation to obtain funds to which it claims entitlement, in the context of large-scale contracts under a Government program. *See Warner* v. *Cox,* 487 F.2d 1301 (5th Cir. 1974).

The lack of any urgent need for entry of a final judgment is underlined by the staleness of the claims upon which Curtiss-Wright's Complaint is based. The Complaint rests primarily upon allegations that Curtiss-Wright relied upon false representations by General Electric and the Navy in entering into the Naval Nuclear Program in 1968, and expanding its role in that Program substantially in late 1968 and early 1969. Whether this action filed on April 30, 1976 is wholly or partly time barred, a matter not yet adjudicated below,[5] Curtiss-Wright's allowing $60,000,000 claims to languish for several years after they could have been brought undermines its present crocodile protestations that it is an "obvious injustice" to delay entry of a final judgment as to individual claims in this litigation. As the Navy observed in calling for enforcement of the contractual clause requiring release as a condition precedent to final payment, if any "hardship" falls upon Curtiss-Wright through a delay in final payment, it stems from its own choice to defer raising

[5] General Electric has raised the defenses of statute of limitations and laches to Curtiss-Wright's legal and equitable claims (A. 58). These defenses have not yet been adjudicated.

and getting resolved the claims before final payment ordinarily would be due (A. 152). Rule 54(b) was not adopted to excuse a large corporation from self-inflicted problems—much less ones falling far short of any legally cognizable "hardship."[6]

To the extent that Petitioner pays lip service to the law by some contention that it has a "hardship" case, it relies ultimately upon two facts: The sum involved is to be considered substantial; and the statutory rate of interest is below current market interest rates. Neither distinguishes this case from the run-of-the-mill money judgment case. Neither is a persuasive or even proper consideration.

B. That A Substantial Amount Of Money Is Involved Is An Impermissible Basis For Rule 54(b) Certification.

First of all, justice and judgments should not turn on the amount of money involved; the law does not bend a more favorable eye to a wealthy corporation than a needy individual. The Curtiss-Wright litmus test of dollar amount could not be applied fairly, only arbitrarily. An amount that one District Judge may regard as requiring certification may not be so regarded by another Judge. If such an approach were sustainable under Rule 54(b) at all, the presumption that the failure to award immediate payment constitutes *per se* hardship properly could not be applied evenly to all parties before the Court, as the denial of $1,000 for even a brief time may confer a significant hardship upon an individual, but little or none

[6] *Cf. Schaefer* v. *First Nat'l Bank of Lincolnwood,* 465 F.2d 234, 235-36 (7th Cir. 1972) (delay in seeking Rule 54(b) certification undermines claim that there is "no just reason for delay" in entry of final judgment).

upon a substantial corporate litigant. The propriety of a Rule 54(b) certification should not turn on whether a litigant can persuade the District Court to regard the sum involved as sufficiently large to invoke the Rule.

The deferral of final judgment and the appeal in this case would not disadvantage Curtiss-Wright relative to thousands of other litigants, individual and corporate, with monetary claims, whose inability to enforce a judgment and to obtain current interest rates may have proportionately far greater effect upon them than it does upon Curtiss-Wright. Even a temporary loss of income for an individual pending legal proceedings does not usually constitute irreparable injury. *Sampson* v. *Murray,* 415 U.S. 61, 89-92 and n. 68 (1974). An individual earning $30,000 a year with a $1,900 claim, or a $300,000-a-year corporation with a $19,000 claim, could assert "infrequent harsh case" as readily as Curtiss-Wright, a $300,000,000 corporation with a $19,000,000 claim. To accept Curtiss-Wright's position would enable it to push to the head of the line of appellate cases, not because it is suffering from harsher circumstances than other claimants, but solely because it has a claim for a larger sum. That a 54(b) certification should turn on that factor is not just.

It is not for the Courts to establish a rule that determines the time for a final judgment and appeal according to the numbers of dollars involved. "The formulation of an appealability rule that turns on the amount of the plaintiff's claim is plainly a legislative, not a judicial, function." *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 472. This was an improper and inadequate basis for the District Court's certification, which rightly did not survive Court of Appeals review.

C. Providing A Higher Interest Rate Than That Prescribed By The State Legislature Is Likewise An Impermissible Basis For Rule 54(b) Certification.

The running of interest upon a judgment at a statutory rate rather than current market rates is likewise an unacceptable reason for entering Rule 54(b) final judgments. Allowing the entry of judgment upon that basis invades the legislative province; and it also reflects an improper disregard of the State substantive law governing in this diversity case. New York law provides that six percent shall be the rate of prejudgment as well as postjudgment interest.[7] That is New York State's resolution of the competing policies as to what rate is just and sufficient. No doubt the New York Legislature and Governor were fully aware that a higher rate of return might be available at various times outside of the litigation arena. That legislative judgment should not be set aside by a Federal District Judge whenever he believes the application of the New York law in a particular case is unfair.

With respect to "providing for interest upon judgments, whether there shall be a definite rule is a matter within the legislative discretion." *Funkhouser* v. *J. B. Preston Co.,* 290 U.S. 163, 169 (1933); *accord, Morley* v. *Lake Shore & M.S. Ry. Co.,* 146 U.S. 162 (1892); *Jamaica Savings Bank* v. *Toomey,* 77 Misc. 2d 887, 355 N.Y.S.2d 268, 270 (Sup. Ct.), *aff'd without opinion,* 46 A.D.2d 847, 363 N.Y.S.2d 313 (1974) (sustaining as within province of legislature, consti-

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[7] N. Y. Civ. Prac. Law, § 5004 (McKinney 1964-1979 Supp.). The District Court ruled that, in light of a contractual clause making applicable New York law (A. 181), that law would govern questions of interest. That ruling, not contested by Curtiss-Wright on appeal, accords with Restatement (Second) of Conflict of Laws §§ 187, 207 (1971). *See* Comments a. and e. to § 207.

tutionality of New York's change in statute, reducing interest rate on judgments from "legal rate" to six percent).

That recovery of interest at rates other than current market rates is a legislative matter, and may not properly be considered an "infrequent harsh case," is illustrated also by the variety of ways in which Congress has treated interest, in many statutes providing for either no or quite limited interest entitlement. On most claims against the Government, no prejudgment interest is awardable and interest runs at a rate of four percent. 28 U.S.C. §§ 2411, 2516, and 2674. Under the Suits in Admiralty Act, interest runs at four percent, and is simple. *See* 46 U.S.C. § 743; *United States* v. *Isthmian S.S. Co.*, 359 U.S. 314, 324-25 (1959). Under the Public Vessels Act, 46 U.S.C. § 782, prejudgment interest is explicitly denied "unless upon a contract expressly stipulating for the payment of interest." *See also* 25 U.S.C. § 656 (judgments to credit of Indians of California draw four percent interest); 31 U.S.C. § 505 (Government may recover only six percent interest against persons accountable for public money who fail to pay it into Treasury). In general, state law governs the running of interest in cases in Federal Courts (*e.g.*, 28 U.S.C. § 1961; Supreme Court Rule 56(1); F.R.App.P. 37); a host of state statutes and court or common law rules limit interest awards. It is commonplace for the rate of interest to be fixed by rule or statute, which may or may not reflect current market rates, as it does not in New York on this kind of claim.[8] From time to time, the state legisla-

[8] *See, e.g.*, Fla.Stat.Ann., § 55.03, (6% or 8%, depending upon Court in which judgment rendered); Idaho Code § 28-22-104 (8%); Ill.Ann.Stat. (1979 Cum.Supp.) ch. 74 § 3 (8%, or 6% for Government debtors); Iowa Code Ann. (1979 Cum.Supp.) § 535.3 (7%); Kan.Stat. Ann. (1974) § 16-204 (8%); Miss. Code (1972 Ann.) § 75-17-7 (8% or rate specified in contract); Mo.Rev.Stat. (1978) § 408.040 (6%); Mont.Rev.Codes Ann. (1947) § 47-128 (6%); Nev. Rev.Stat. (1973) § 17-130(2) (7%); N.H.Rev.Stat.Ann. (1978) § 336:1 (6%); Okla.Stat. (1971) tit. 12 § 727 (10%; 6% in personal injury cases); S.C.Code (1976) § 34-31-20 (6%); Va. Code (1950, 1979 Rep. Vol.) § 6.1-330.9 (6%); Wyo.Stat.Ann. (1977 Rep. Issue) § 1-16-102 (10%).

tures review the statutory rates of interest and revise them to reflect current circumstances, if they conclude that to be in the public interest.[9] Often no prejudgment interest is available upon unliquidated claims. *See e.g., Christiansen* v. *Farmers Ins. Exchange,* 540 F.2d 472, 478 (10th Cir. 1976) (Idaho and Utah Law); *Burran* v. *Dambold,* 422 F.2d 133, 136 (10th Cir. 1970) (New Mexico law); *Omaha Paper Stock Co.* v. *Harbor Ins. Co.,* 596 F.2d 283, 292 (8th Cir. 1979) (Nebraska law); *Mann and Parker Lumber Co.* v. *Wel-Dri,* 579 F.2d 973, 980 (6th Cir. 1978) (Tennessee law).

If any relief is to be afforded to holders of judgments in Federal Courts with respect to interest rates, it must be by the Congress. In fact, a Bill is now pending in Congress on that very subject. Senate Bill No. 1477, 96th Congress, 1st Session, the Federal Courts Improvement Act of 1979, passed the Senate on October 30, 1979; it is pending in the House of Representatives. Section 211(a) of that Bill would amend 28 U.S.C. § 1961 to provide that interest on judgments be allowed "at the rate established pursuant to section

[9] For example, Idaho, Illinois and Mississippi all recently increased the rates from six percent to eight percent. Iowa raised its statutory rate from five percent to seven percent in 1973. *See* Annotations to each of the Code Sections cited in footnote 8 above.

6621 of the Internal Revenue Code . . .," rather than "at the rate allowed by State law."[10] Section 211(b) would permit the discretionary award of prejudgment interest in certain circumstances.[11] Section 501 of the Bill provides that most of its provisions, including those relating to interest, "shall take effect two years after the date of enactment of this Act."

If inadequacy of statutory interest rates is a problem, emasculation of the finality rule would be a peculiarly clumsy and self-defeating solution. Not only would the toll upon orderly judicial administration be heavy, but many litigants whose turn in court was delayed would lose interest, particularly if their claims were unliquidated.

None of the foregoing was considered in *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976), relied upon by Petitioner (Pet. Br. 19, 31). While that case does refer to a loss of interest, without analysis and unsoundly in

[10] Section 6621 of Title 26, U.S.C., the Internal Revenue Code, provides for a basic interest rate of nine percent upon underpayments or overpayments of taxes, subject to adjustments, made not more frequently than every 23 months. Those adjustments peg the rate at the "adjusted prime rate charged by banks" during September of the year in which the adjustment is made, and become effective the following February. The term "adjusted prime rate charged by banks" is defined (26 U.S.C. § 6621(c)) as "90 percent of the average predominant prime rate quoted by commercial banks to large businesses, as determined by the Board of Governors of the Federal Reserve System."

[11] With respect to prejudgment interest, under present law in diversity cases the conflicts rule of the forum is followed. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Quad Constr., Inc.* v. *Wm. A. Smith Contracting Co.*, 534 F.2d 1391, 1394-99 (10th Cir. 1976).

our view for reasons discussed above, it does not assert that factor as an independently decisive consideration, only as one of many factors supporting a Rule 54(b) certification under the particular facts of that case. While the Petitioner asserted a "conflict" between *United Bank of Pueblo* and the decision below, based solely upon the off-hand reference to interest in *United Bank of Pueblo* (Petition 9), that case is readily distinguishable: All claims between the two contending parties had been fully and finally adjudicated; the party in whose favor certification was granted did not face remaining counterclaims, so that there was no prospect of payment of substantial sums to it followed by a later obligation of repayment. What remained to be litigated was only an unrelated cross-claim, which could not affect the plaintiff's right to recovery, or the amount of its recovery. Further, the decision on the Rule 54(b) appeal was expected to facilitate, and possibly moot or render unnecessary, the trial of the third-party action. 529 F.2d at 492-493. Under those circumstances, deciding the appeal before all claims were adjudicated apparently served the interests of judicial economy. Certainly the case does not support the notion that a Federal Court in a diversity case may in effect modify the statutory interest rate established by a State.

Rule 54(b) provides no such license to invade this patently legislative domain. Curtiss-Wright is plainly in error in suggesting that the Rule conveys any such license and the District Court clearly erred in accepting the suggestion. The Court of Appeals was quite correct in setting aside the certification which so misconceived Rule 54(b) and the judicial function.

D. Rule 54(b) Could Not Properly Have Been Invoked Under These Circumstances.

Consequently, it is naught but *ipse dixit* to assert that "[i]f ever there were a case for which Rule 54(b) was intended it is the case before this Court" (Pet. Br. 33-34). In reality, the kinds of cases in which genuine harshness of non-finality has resulted in the entry of Rule 54(b) judgments contrast sharply with the present one. In *In re Uranium Antitrust Litigation,* 26 F.R. Serv. 2d 847, 853-54 (N.D.Ill. 1979), for example, a Rule 54(b) judgment was entered against defaulting defendants. The Court reasoned that all were foreign corporations, and there existed a significant danger that they might conceal or transfer assets while other claims were decided. In addition, the seriousness of the charges of the complaint against them and their willful avoidance of meeting those charges "require that they be held promptly accountable for their alleged actions." It could have been added that in a default case, there was little likelihood of a piecemeal appeal, or any appeal. *See also Ferguson* v. *Bartels Brewing Co.,* 26 F.R.D. 612 (S.D.N.Y. 1960) (Rule 54(b) judgment entered against company whose president willfully failed to appear for deposition, and who was withdrawing assets from the company to the derogation of creditors), *appeal dismissed,* 284 F.2d 855 (2d Cir. 1960).[12] Similarly, the potentiality of death of witnesses, loss or destruction of records or diminished recollection has been held to

[12] The appeal was dismissed in *Ferguson*, notwithstanding the hardship, on the ground that Rule 54(b) did not apply to adjudications against but one party. Shortly thereafter, in 1961, Rule 54(b) was amended to permit certifications, if otherwise proper, in multi-party cases.

justify such an entry. *Grimm* v. *Whitney-Fidalgo Seafoods, Inc.,* 61 F.R.D. 310 (S.D.N.Y. 1974).

That such exceptional circumstances are required to invoke Rule 54(b) is suggested also by the citation in the Advisory Committee's Note to the 1961 revision to the concurring opinion of Judge Frank in *Pabellon* v. *Grace Line,* 191 F.2d 169, 179 (2d Cir.), *cert. denied,* 342 U.S. 893 (1951), as illustrating that "The danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multi-parties situations as in multiple-claims cases." That opinion had noted as a "serious injustice" the following example:

> "In a suit with several defendants charged jointly, the trial court, previous to trial, erroneously orders and dismisses the one solvent defendant. Being unable to appeal from that order, plaintiff must go through a long, expensive trial, lasting several months, in which he obtains a judgment that is worthless practically, before he can procure a reversal of the order dismissing the solvent defendant, and thus be able to try and to prove his case against that defendant." 191 F.2d at 179.

As similarly indicated in *Allis-Chalmers, supra,* 521 F.2d at 366, n. 14, the Rule aims mainly at situations "involving considerations of solvency, economic duress, etc." *See also Campbell* v. *Westmoreland Farm, Inc., supra,* 403 F.2d at 942 (certification improper where an appeal would not eliminate unnecessary evidence or shorten the trial, "[n]or is this a situation where plaintiffs' recovery would be jeopardized or prejudiced if they had to await trial" of a claim not yet adjudicated).

The other considerations cited by the District Court as supporting certification here do not bear upon whether this is an "infrequent harsh case." They recite only compliance with technical requirements of Rule 54(b), such as the severability of the claim, or the absence of factors which would further weigh against certification, *i.e.*, that "certification should not prevent the rest of the case from being prepared for trial" (A. 197). As to the first, compliance with "technical requirements of the Rule" is "not sufficient." *Brunswick Corp.* v. *Sheridan, supra,* 582 F.2d at 182-83. Although it is literally true that certification does not "prevent" the case from being prepared, neither does it here aid in such preparation. "Rule 54(b) orders usually have the unfortunate effect of delaying the main action . . . ." *Schwartz* v. *Compagnie General Transatlantique,* 405 F.2d 270, 274 (2d Cir. 1968). *See also Northway, Inc.* v. *TSC Industries, Inc.,* 361 F.Supp. 108, 117 (N.D.Ill. 1973) ("[a]n appeal . . . would only serve to delay the trial of the claims against the corporate defendants, by diverting plaintiff's attorneys' energies"), *aff'd in part, rev'd in part on other grounds,* 512 F.2d 324 (7th Cir. 1975), *judgment rev'd on other grounds,* 426 U.S. 438 (1976).

The other considerations relied upon by the District Court, that it should prove unnecessary for the Court of Appeals to review the same issues twice and that the decided claims are likely not be mooted by future developments, are neutral or irrelevant to determining whether deployment of Rule 54(b) is justified. As in *Panichella* v. *Pennsylvania Railroad Co., supra,* 252 F.2d at 455, the possibility that a question may be mooted by subsequent developments may militate against immediate Rule 54(b) certification, because the Court of Appeals might never have to decide the issue.

But if, as the District Court hypothesized,[13] the issue will not be mooted, it will have to be confronted at some time. Whether it should confront the issue while further proceedings in the District Court continue or rather at the termination of all the District Court proceedings is the very question posed in considering whether to enter a final judgment under Rule 54(b). A determination as to whether the claims will become moot, or whether an issue will have to be heard twice by the Court of Appeals, furnishes no answer or guidance directed to the question when appellate review should occur. Certainly neither consideration is relevant to the showing demanded by the availability of 54(b) only in the "infrequent harsh case."

The narrowness of the Rule 54(b) exception to the general finality rule is emphasized by decisions of this Court analogizing the showing required under the Rule to requiring a showing of irreparable damage if an interlocutory appeal were not permitted. In *DiBella* v. *United States,* 369 U.S. 121, 126 (1962) (per Frankfurter, J.), for example, Rule 54(b) was characterized as being of "like effect" to doctrines permitting immediate appeals where otherwise the right of appellate review could be frustrated and "the practical effect of the order will be irreparable by any subsequent appeal."[14] And in *Gardner* v. *Westinghouse Broad-*

[13] It indeed is highly speculative whether there will need to be an appeal on the release issue at the end of this complex commercial case.

[14] *Compare Abney* v. *United States,* 431 U.S. 651 (1977) (denial of motion to dismiss on double jeopardy grounds appealable, for rights conferred by double jeopardy clause otherwise could be substantially impaired); *with United States* v. *McDonald,* 435 U.S. 850 (1978) (no piecemeal appeals from denial of motion to dismiss for speedy trial denial).

casting Co., 437 U.S. 478 (1978), the statutory provision (28 U.S.C. § 1292(a)(1)) permitting appeals from orders granting or denying interlocutory injunctions was characterized as a "narrow" exception to the finality rule, "keyed to the 'need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequences'" (quoting *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176, 181 (1955)). Rule 54(b) is aimed at comparable injustice, and it, too, is a "narrow" exception to the finality rule. The particular consequences of which Curtiss-Wright is complaining and the considerations which the District Court recited simply do not meet the test imposed by the law. The plain truth is that Curtiss-Wright did not make the showing required to qualify this as an "infrequent harsh case" permitting Rule 54(b) certification.

III. THE EXISTENCE OF SUBSTANTIAL COUNTERCLAIMS IS A FACTOR PROPERLY CONSIDERED AS WEIGHING AGAINST THE ENTRY OF FINAL JUDGMENTS UNDER RULE 54(b).

A. The Third Circuit Position Is That The Existence Of Counterclaims Is One Factor Which May Properly Be Weighed; A *Per Se* Rule Is A Straw Man Of Petitioner's Weaving.

The simplistic approach of Curtiss-Wright wrenches out of context and misstates the Third Circuit's views as to the relationship of counterclaims to applications for entry of Rule 54(b) judgments. Indeed, in posing the question presented as whether the existence of counterclaims *per se* precludes the issuance of a Rule 54(b) certification (*e.g.*, Pet. Br. 2, 20), Curtiss-Wright addresses an issue nowhere presented. The Third Circuit's position with respect to the effect of the pendency of substantial counterclaims upon the

consideration of applications for entry of a final judgment under Rule 54(b), as explicated in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975), upon which that Court relied in this case (A. 197), is not that such counterclaims *per se* bar certification, but rather that "[*i*]*n the absence of unusual or harsh circumstances,* we believe that the presence of a counterclaim, which could result in a set-off against any amounts due and owing to the plaintiff, weighs heavily against the grant of 54(b) certification" (*id.* at 366). The Third Circuit characterized the existence of a counterclaim as "one factor" bearing upon the Rule 54(b) application. *Id. See also TPO Incorporated* v. *FDIC*, 487 F.2d 131, 134 (3d Cir. 1973) ("We see no special circumstances in the record which would favor the entry of judgment in favor of TPO at this time when it is possible that subsequent litigation may require a return of the sum awarded and perhaps additional moneys.") In none of its leading cases—*Allis-Chalmers, TPO,* or the present one—has the Third Circuit held that if "special circumstances" or genuine hardship were shown, those considerations could not override the natural reluctance to enter final judgment under Rule 54(b) when counterclaims remained pending.[15] In short, the Third

[15] Under New York law "it is improper to award summary judgment . . . while there exists a meritorious counterclaim for an amount equal to or greater than that demanded in the complaint." *Illinois McGraw Elec. Co.* v. *John J. Walters, Inc.*, 7 N.Y.2d 874, 196 N.Y.S.2d 1003, 164 N.E.2d 872 (1959); *Scolite Internat'l. Corp.* v. *Vincent J. Smith, Inc.*, 68 A.D.2d 417, 419, 418 N.Y.S.2d 191, 193 (1979). Although we do not urge that New York summary judgment practice applies in a federal diversity suit, *see Schroeter* v. *Ralph Wilson Plastics, Inc.*, 49 F.R.D. 323, 326 (S.D.N.Y. 1969), the fact that the claim evidently would not even yet be adjudicated in a State Court further diminishes any argument that there is here a legally cognizable "harshness."

Circuit is on target, while Curtiss-Wright is off target altogether; the issue in the case is whether Curtiss-Wright has met its burden affirmatively to show that this is an "infrequent harsh case."

In appraising the presence of counterclaims as a factor to be considered with regard to 54(b), and as one tending strongly against certification, the Third Circuit is in accord with other authority. *See, e.g., Gaetano Marzotto & Figli, S.P.A.* v. *G.A. Vedovi & Co.*, 28 F.R.D. 320 (S.D.N.Y. 1961); *Schroeter* v. *Ralph Wilson Plastics, Inc.*, 49 F.R.D. 323, 326 (S.D. N.Y. 1969); 6 *Moore's Federal Practice* ¶ 54.35[1] at 585 (2d ed. 1976) ("The district court's discretion in entering a 54(b) certificate where a counterclaim is involved should be exercised with special care"); 3 *Moore's Federal Practice* ¶ 13.17 at 432 (2d ed. 1979); 10 Wright & Miller, *Federal Practice and Procedure, Civil* § 2659 at 82 (1973) (it is undesirable to require one party to pay over to the other substantial sums "only to be reimbursed if it prevails on its as yet unadjudicated counterclaim"); 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1241. *Cf., Bethlehem Steel Corp.* v. *Tishman Realty & Const. Co.*, 72 F.R.D. 33, 39-40 (S.D.N.Y. 1976).

B. There Is No Support For The Curtiss-Wright Position That The Existence Of Counterclaims May Not Properly Be Considered.

The contrary arguments of Curtiss-Wright are based upon a superficial, untenable reading of the history of Rule 54(b), and of the ruling of this Court in *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445 (1956). With respect to history, Curtiss-Wright's contention is essentially that because the 1946 amendment of Rule 54(b) elimi-

nated previously existing language barring certifications in any case in which a compulsory counterclaim remained pending,[16] thereafter the existence of such a counterclaim was no factor in determining whether to certify. The argument is a *non sequitur;* its conclusion fails to follow from its premise.

> "Under Rule 54(b), as originally promulgated, the court could not enter a separate judgment upon a claim that was final for purposes of appeal prior to the disposition of a compulsory counterclaim . . . . By virtue of the recasting of Rule 54(b) in 1946, however, the court may now direct the entry of a separate final judgment on the claim or counterclaim upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. . . . Although the amended Rule gives the power, *it will probably be a rare case in which the court will find it advisable to enter a final appealable judgment on a claim or compulsory counterclaim prior to judgment on the other side of the case,* since one of the main objectives of Rule 13(a) is to treat as a unit a claim and a counterclaim which arises out of the transaction or occurrence made the basis of the original claim, and since *one purpose of the amendment of Rule 54(b) was to lessen the likelihood of piecemeal disposition of an action.*" 3 *Moore's Federal Practice* ¶ 13.17 at 13-431 to 13-432 (2d ed. 1979).

So far as concerns the volume of cases to be eligible for 54(b) certification, the intention in the 1946 amendment was "to restrict appeals in litigation involving multiple claims," 6 *Moore's Federal Practice* ¶ 54.27 [2-2] at 325 (2d ed. 1976); as noted above, "to *lessen* the likelihood of piecemeal disposition of an action."

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[16] *See* 6 *Moore's Federal Practice* ¶ 54.01[3] (2d ed. 1976).

Plainly, before 1946, no final judgment could have been entered when a compulsory counterclaim remained unadjudicated. The 1946 amendment was quite limited. It was to retain the integrity of the general finality rule but to avoid confusion in several areas—including the drawing of fine lines between permissive and compulsory counterclaims which occasioned repeated appeals as a protective matter.

There is no hint in the Advisory Committee Notes that bringing certainty to this area would countenance free-wheeling certification of appeals under Rule 54 (b) irrespective of the existence of substantial counterclaims. Certainly the amendment was not meant to permit certification in every money judgment case in which the market interest rate exceeds the statutory rate—hardly an "infrequent" occurrence—despite the pendency of pertinent counterclaims and absent a showing of special circumstances. The "infrequent harsh case" proviso shows that the Advisory Committee and the Rule were looking in the opposite direction.

Cold Metal Process, supra, harbors no more support for Petitioner than the 1946 amendment. In that case, and the companion case, *Sears, Roebuck and Co.* v. *Mackey,* 351 U.S. 427 (1956), the Rule 54(b) exception to the entrenched principle that appeals should be taken only after all claims are disposed of was attacked as exceeding the bounds of the statutory finality rule incorporated in 28 U.S.C. § 1291. This Court repelled that attack, holding that "[t]he amended rule preserves the historic federal policy against piecemeal appeals in many cases more effectively than did the original rule." *Sears, Roebuck, supra,* 351 U.S. at 438. *Sears, Roebuck* and *Cold Metal Process* were not directed at the nature and quality of the showing required for a

Rule 54(b) certification; the Court merely noted that the District Courts had discretion to act in the first instance, and that "[w]ith equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals." *Sears, Roebuck, supra,* 351 U.S. at 437.

Far from suggesting that merely because some claims could not be certificated despite the presence of counterclaims, it was always a permissible exercise of discretion to do so, *Cold Metal Process* implied the contrary: "under the amended rule, the relationship of the adjudicated claims to the unadjudicated claims is one of the factors which the District Court can consider in the exercise of its discretion. If the District Court certifies a final order on a claim which arises out of the same transaction and occurrence as pending claims, *and the Court of Appeals is satisfied that there has been no abuse of discretion,* the order is appealable." 351 U.S. at 452.

The facts as to the adjudicated claims and the remaining counterclaim in *Cold Metal Process* are so completely different from those in the present case, indeed unique, as to render untenable Curtiss-Wright's argument that certification here is not an abuse of discretion merely because certification was permissible in *Cold Metal Process.* As the opinions of this Court and the Third Circuit (190 F.2d 217, 221) in *Cold Metal Process* indicate, the counterclaim was purely ancillary to the main action in which an appeal was taken from a master's report. Indeed, the parties agreed that final action upon the master's report should precede any trial on the counterclaim; and that such action might even make it undesirable to try the counterclaim. 351 U.S. at 450, n. 5. Apparently the counterclaim pri-

marily sought additional relief which might be appropriate in the eventuality that the master's report would be sustained on appeal and certain additional facts could be proved. *See* 190 F.2d at 220-21. Where an immediate appeal on adjudicated claims may obviate the need for further proceedings in the District Court, a certification may serve the interests of judicial economy. *See also Gas-A-Car, Inc.* v. *American Petrofina, Inc., supra,* 484 F.2d at 1105; *Campbell* v. *Westmoreland Farm, Inc., supra,* 403 F.2d at 942; *Purdy Mobile Homes* v. *Champion Home Builders, supra,* 594 F.2d at 1316-1317.

No similar factors support Curtiss-Wright's attempt to invoke Rule 54(b). In this case, the Counterclaims are not ancillary but compulsory; they arise from the identical contracts as do Curtiss-Wright's claims.[17] The Counterclaims are substantial and have been sustained

[17] *See, e.g., Parmalee* v. *Chicago Eye Shield Co.,* 157 F.2d 582 (8th Cir. 1946); 3 *Moore's Federal Practice* ¶ 13.13 (2d ed. 1979). Should the Court consider Curtiss-Wright's demeaning of General Electric's Counterclaims as "weak" (Pet. Br. 24), or merely "facially" valid but factually unsustainable, as relevant or proper, a brief discussion of the claims and counterclaims in this action seems in order. The principal claims of Curtiss-Wright are that it was "guaranteed" a profit under *fixed-price* contracts, or that it relied upon alleged representations of General Electric that it "would" make a profit in an endeavor expected to extend over many years and necessarily involving a multitude of factors affecting profitability. From General Electric's perspective, such contentions are utterly alien to these commercial contracts and relationships between two well-established large corporations each of which is well able to take care of itself; the Curtiss-Wright claims lack any basis in fact or merit in law; they have not yet been tested upon a motion to dismiss or for summary judgment.

Contrastingly, the Counterclaims have withstood a motion to dismiss. The legal bases for General Electric's Counterclaims which seek recovery of benefits General Electric conferred upon

as against a motion of Curtiss-Wright to dismiss. The adjudication by the Third Circuit of the sharply contested issue concerning final payments[18] would not aid in the District Courts disposition of any other issues. It would require the Third Circuit to delve in some degree into the relationship of the parties and some of the circumstances underlying their broad-ranging dispute; Curtiss-Wright's attempt to appeal indeed would irrevocably involve the Third Circuit in a classic "piecemeal" appeal.

Curtiss-Wright are set forth at pages 10-45 in the Brief General Electric filed in the District Court on May 31, 1977, in opposition to Curtiss-Wright's motions for summary judgment regarding the release issue, and to dismiss the Counterclaims, which is part of the record on file with the Clerk of this Court. In its footnote (Pet. Br. 24 n. 23) attempting to cast doubt upon the merits of General Electric's Counterclaims, Curtiss-Wright relies upon materials, General Electric's Responses to Interrogatories, which Curtiss-Wright did not rely on before the District Court or before the Court of Appeals until rehearing. If this Court is to be importuned to make judgments about the merits of General Electric's Counterclaims based upon such matters, General Electric would point to Supplemental Responses it has recently filed to Curtiss-Wright's Interrogatories, specifying hundreds of instances of unworkmanlike and incompetent performance by Curtiss-Wright, and of assistance rendered by General Electric.

[18] To say the least, there is grave doubt as to the correctness of a decision holding that a large commercial party is entitled to maintain a $60,000,000 lawsuit and yet receive a final payment even though it agreed "as a condition precedent to final payment" that the other party to the contract, and the Government, be released from all liabilities and claims arising under or by virtue of the contract. General Electric considers the District Court's ruling on the merits to be entirely incorrect. Many New York cases strictly enforce "condition precedent" clauses in similar circumstances. *E.g., Coulter* v. *Board of Education,* 63 N.Y. 365, 368-369 (1875); *R. J. Marshall, Inc.* v. *Turner Construction Co.,* 139 N.Y.S.2d 55, 58 (Sup. Ct. 1955); *Witherell* v. *Lasky,* 286

C. There Is No Support For The Curtiss-Wright Position That Considerations Which May Be Taken Into Account Under Rule 62(h) Are *Ipso Facto* Barred From Consideration Under Rule 54(b).

The argument by Curtiss-Wright that the Third Circuit's approach "ignores the interrelationship between Rules 54(b) and 62(h)" (Pet. Br. 25-29) is specious and itself misunderstands that relationship. In essence, Curtiss-Wright contends that because the District Court may consider hardships to the parties in deciding under Rule 62(h) whether to stay Rule 54(b) judgments, perforce it may not consider harshness in deciding whether to enter the Rule 54(b) judgment itself. Logic and realism are wanting in this contention.

The history of Rule 62(h) is itself dispositive. That Rule was a product of the 1946 amendments and embodies a revision of language which previously had appeared in Rule 54(b) itself. Obviously, the Advisory Committee which stressed that Rule 54(b) as amended in 1946 extended permissible certification only to the "infrequent harsh case" never removed that test from Rule 54(b), least of all by transferring language dealing with stays, and not certifications, to Rule 62(h).

A primary reason why Rule 54(b) judgments are to be entered only in the "infrequent harsh case" is one which is not addressed at all by a Court in the context of deciding under Rule 62(h) merely whether a judgment should be stayed pending a Rule 54(b) appeal from the resolution of part of a case: the preservation

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App.Div. 533, 535, 145 N.Y.S.2d 624, 626 (1955). *See also Brandt Corp.* v. *City of New York*, 14 N.Y.2d 217, 219-220, 250 N.Y.S.2d 407, 409, 199 N.E.2d 493, 494-495 (1964). The single case relied upon by the District Court as supporting a contrary result simply did not involve a "condition precedent" clause at all.

of the integrity of the finality rule. The 1946 Advisory Committee Note explicitly states that such is the function of the "infrequent harsh case" limitation. *See* 5 F.R.D. at 473; *Brunswick Corp.* v. *Sheridan, supra,* 582 F.2d at 183.

Obviously, legal concepts and criteria are not ticketed and useable for one Federal Rule of Civil Procedure, and one Rule only. To take but one example, "irreparable damage" is a central consideration under Rule 65 with respect to injunctive orders and under Rule 62 with respect to consideration of whether to stay such orders; that concept may be considered akin to the Rule 54(b) "infrequent harsh case" requirement. *See* pp. 31-32, *supra.* Curtiss-Wright can hardly be more successful in its backdoor Rule 62(h) attack upon that requirement embedded in Rule 54(b) than in its direct attacks disposed of earlier in this Brief.

The decision upon a motion to certify under Rule 54(b) implicates the interests "of sound judicial administration and public policy." *Allis-Chalmers Corp.* v. *Philadelphia Elec. Co., supra,* 521 F.2d at 365; *Arlinghaus* v. *Ritenour,* 543 F.2d 461, 464 (2d Cir. 1976). In the context of passing upon motions for Rule 54(b) certifications the Court decides whether an early appeal is necessary; in the context of passing upon stays under Rule 62(h) where such an appeal is appropriate, the Court deals with a much narrower question of the status of the judgment during the limited period of the 54(b) appeal.

The usual function of the District Court in passing under Rule 62(h) is to insure that the party in whose favor the judgment runs does not lose the security

for the judgment while the appeal is pending;[19] by its very terms Rule 62(h) speaks of the court's prescribing conditions "as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." *See also Robbins Flooring, Inc.* v. *Federal Floors, Inc.*, 445 F.Supp. 4, 13-14 (E.D. Pa. 1977) (stay denied where defendant in financial difficulties offered no acceptable plan for ultimate satisfaction of judgment).

It is vacuous to suggest that merely because harshness, or the lack of it, is weighed in the narrower context of Rule 62(h), it cannot be also considered when the Court decides the broader matter of whether an appeal should be allowed. Curtiss-Wright's approach would make a shambles of the Federal policy against piecemeal appeals. It would be little solace to Courts of Appeals inundated with Rule 54(b) appeals, or litigants waiting their turn while such appeals are decided, that the District Courts had acted with care and weighed the hardships in deciding whether the judgment should be stayed pending that unnecessary appeal.

A nuance of Curtiss-Wright's argument on this point, and identically a *non sequitur*, is the suggestion (Pet. Br. 27-28) that because a Court undoubtedly may consider the pendency of a counterclaim as the reason to enter a stay under Rule 62(h), *e.g., Tire Sales Corp.* v. *Cities Services Oil Corp.*, 410 F. Supp. 1222,

[19] If a 54(b) certification is improper, or there otherwise is no proper final judgment entered, there of course may be no execution upon a grant of summary judgment under Rule 56, even without a stay. *See Internat'l Controls Corp.* v. *Vesco*, 535 F.2d 742, 744 (2d Cir. 1976), *cert. denied*, 434 U.S. 1014 (1978); *Redding & Co.* v. *Russwine Construction Corp.*, 135 U.S.App.D.C. 153, 159, 417 F.2d 721, 727 (D.C. Cir. 1969).

1232 (N.D. Ill. 1976), that consideration must be banished in deciding whether a Rule 54(b) judgment should be entered.[20] Quite the contrary is most reasonable: In fact, Courts should and do recognize the general inadvisability of forcing a party to pay out monies at an interlocutory stage only to recoup them later in the suit, an inadvisability which, in the absence of a showing of genuine hardship, militates both against 54(b) entry of a final monetary judgment and in favor of stays of any judgments. *See, e.g., Allis-Chalmers, supra,* 521 F.2d at 366; 10 Wright & Miller, *Federal Practice and Procedure: Civil* § 2659 (1973). Reason and realism commend recognition of the pendency of counterclaims as a strong factor militating against 54 (b) certification.

IV. THE COURTS OF APPEALS HAVE THE AUTHORITY AND DUTY TO REVIEW FOR ABUSE OF DISCRETION RULE 54(b) CERTIFICATIONS AND THAT AUTHORITY WAS EXERCISED PROPERLY HERE.

That the Courts of Appeals properly review for abuse of discretion District Court certifications and entries of final judgments under Rule 54(b) is settled beyond serious dispute. In recognizing the initial discretion in the District Courts, this Court in *Sears, Roebuck and Co.* v. *Mackey, supra,* added that "[w]ith equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals." 351 U.S. at 437. The principal reason why such review is fitting, and one to which the Courts of Appeals are particularly

[20] Curtiss-Wright argues for this proposition on the basis of cases which hold that the pendency of a counterclaim or set-off is ground for entry of a stay under Rule 62(h). The cases do not hold that such is not a proper matter to be considered under Rule 54(b); that embellishment is solely Curtiss-Wright's.

sensitive, is the preservation of the Federal finality rule and its policy against piecemeal appeals. Since *Sears, Roebuck* and *Cold Metal Process* the Courts of Appeals have fully recognized their duties to scrutinize Rule 54(b) certifications carefully rather than blindly acquiescing in them. "[T]he required determination 'that there is no just reason for delay' ought not to be made as a matter of rote—even when, as here, there was no objection from the party who would be adversely affected or anyone else." *Arlinghaus* v. *Ritenour, supra,* 543 F.2d at 463.

The Courts of Appeals indeed have overturned Rule 54(b) certifications not only where formal requirements such as the full disposition of a severable "claim" have not been met,[21] but also when the grant of the certification was improvident because the situation did not present the "infrequent harsh case" in which the limited exception to the finality rule was justified,[22] or other reasons made the certification an abuse of discretion.[23]

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[21] *E.g., McIntyre* v. *First National Bank of Cincinnati,* 585 F.2d 190 (6th Cir. 1978); *McNellis* v. *Merchants Nat'l Bank & Trust Co.,* 385 F.2d 916 (2d Cir. 1967); *Cott Beverage Corp.* v. *Canada Dry Ginger Ale,* 243 F.2d 795 (2d Cir. 1957). *Cf. Liberty Mut. Ins. Co.* v. *Wetzel,* 424 U.S. 737, 743-744 (1976).

[22] *E.g., Campbell* v. *Westmoreland Farm, Inc., supra,* 403 F.2d at 942; *Panichella* v. *Pennsylvania R.R. Co., supra,* 252 F.2d at 455; *Columbia Broadcasting System* v. *Amana Refrigeration, supra,* 271 F.2d at 259 ("The instant case presents no hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal"); *Gass* v. *Nat'l Container Corp.,* 271 F.2d 231, 233 (7th Cir. 1959).

[23] *E.g., Robbin* v. *American University,* 117 U.S.App.D.C. 351, 330 F.2d 225 (1964) (immediate appeal could adversely affect party in District Court who had not been heard); *Zangardi* v. *Tobriner,* 117 U.S.App.D.C. 350, 330 F.2d 224 (1964) (where

The Third Circuit's dismissal of the appeal in the present case falls well within the appropriate function of the Courts of Appeals. The role of the Courts of Appeals is to prevent undue expansion of the limited exception from the finality rule conveyed by Rule 54(b). Courts of Appeals have the duty to safeguard their ability to carry out their statutory function to adjudicate appeals from final judgments as economically and expeditiously as possible.

One aspect of the appellate review function over Rule 54(b) certifications is to insure that the District Courts, as well as not adopting too lax an approach, apply principled standards which do not undermine the policy against piecemeal appeals. Here the District Court in finding "hardship" relied solely upon two factors—the size of the judgment, and the difference between statutory interest rates and current market rates—which are unacceptable on principle for the reasons set out above. The District Court also required no affirmative showing on the part of the applicant for the certification, and afforded inadequate consideration to the pendency of Counterclaims.

In review of Rule 54(b) certifications even more than in review in other areas of law in which a District Court has considerable discretion, the appellate court properly may scrutinize and reverse a determination based upon faulty standards or premises. *E.g., Delaware and Hudson Ry. Co.* v. *United Transportation Union,* 146 U.S.App.D.C. 142, 450 F.2d 603, 619, *cert.*

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two counts turn on same question, disposing of one and leaving other for future disposition "complicates the case and serves no useful purpose"); *Brunswick Corp.* v. *Sheridan, supra,* 582 F.2d at 183.

denied, 403 U.S. 911 (1971). The appellate courts have a special concern, expertise, and interest in maintaining the integrity of the finality rule.

The Courts of Appeals have the primary responsibility for reviewing Rule 54(b) certifications, in light of the particularized situation; their decisions should not be reversed unless they have misconceived the review function. *Cf. National Labor Relations Board* v. *Pittsburgh S.S. Co.,* 340 U.S. 498, 502-503 (1951); *Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 396, 400-01 (1958); *Golden State Bottling Co.* v. *National Labor Relations Board,* 414 U.S. 168, 172 (1973); *South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers,* 425 U.S. 800, 803 n. 5 (1976). There was no such misconception here. The decision below should be affirmed.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Third Circuit should be affirmed.[24]

Respectfully submitted,

ISAAC N. GRONER
WALTER H. FLEISCHER
ALFRED F. BELCUORE

COLE AND GRONER, P.C.
1730 K Street, N.W.
Washington, D.C. 20006

ALBERT G. BESSER
HANNOCH, WEISMAN, STERN & BESSER, P.A.
744 Broad Street
Newark, New Jersey 07102

Of Counsel:

JAMIE H. GEARON
General Electric Company
One River Road
Schenectady, New York 12345

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[24] In the conclusion of its Brief, at p. 34, Curtiss-Wright asks that the case be remanded to the Court of Appeals "with a direction to reinstate the orders of final judgments of the district court . . . ." This request for relief elides the fact that the Third Circuit has not passed upon the merits of General Electric's appeal. Should this Court reverse the Third Circuit on the Rule 54(b) issue, the case must of course be remanded for a decision upon the merits of the release issue.